Filed 8/10/09 Hernandez v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

IRENE E. HERNANDEZ et al., Petitioners, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; MONICA ALVAREZ et al., Real Parties in Interest.	E048424 (Super.Ct.No. SCVSS014197) OPINION

ORIGINAL PROCEEDINGS; writ of mandate. Frank Gafkowski, Jr., Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Petition granted.

Darling & Risbrough, Robert C. Risbrough, Robert M. Yoakum and Graham M. Cridland for Petitioners.

No appearance for Respondent.

North County Law Firm, Anton C. Gerschler and Dena M. Acosta for Real Parties in Interest.

In this matter we have reviewed the petition, the response filed by the real parties in interest, and the reply. We have determined that the resolution of the matter involves the application of settled principles of law and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc*. (1984) 36 Cal.3d 171, 178.)

FACTS

Real parties in interest (real parties) were the parents/guardians of two young children who died by drowning. A wrongful death action was originally brought by real parties against petitioners and others in September 2006. On July 18, 2008, petitioners filed a cross-complaint for indemnity, negligence, contribution, declaratory relief and apportionment of fault against real parties and others. On September 29, 2008, real parties' default was entered by the court clerk. Real parties' first attempt to have the default set aside was denied by the court on February 24, 2009, for inadequate notice and other procedural defects. The motion that is the subject of this petition was filed on April 1, 2009, seeking relief from default on the ground that the attorney mistakenly believed that the trial court had deemed the cross-complaints answered. The trial court granted the motion and this petition followed.

DISCUSSION

Preliminarily we note that both petitioners and real parties mistake the entry of default for a judgment. Real parties claim the issue of the propriety of the trial court

granting the motion for relief from default is consequently an appealable order after a final judgment, and is therefore not the proper subject of writ relief. There are two problems with this assertion. First, no appeal lies from the mere entry of default. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) Rather, a default entry is reviewable only on appeal from the default judgment. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2.167, pp. 2-92 to 2-93.) No default judgment was entered here. Similarly, an order granting a motion to vacate the entry of default is not appealable. (*Rappleyea v. Campbell*, at p. 981.) Second, there is no final appealable judgment because causes of action remain to be decided between the parties on the complaint itself. "[A]n appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment . . . may be characterized as 'separate and independent' from those remaining." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) Because the underlying "judgment" would not have been appealable even had it been entered, the order granting relief from default would not be appealable as an order after a final judgment. Since no appeal is available from the trial court's order, writ relief is appropriate.

Code of Civil Procedure section 473, subdivision (b), authorizes the trial court to set aside a "judgment, dismissal, order, or other proceeding" (such as the entry of default) taken against a party as the result of mistake, inadvertence, surprise or excusable neglect. An application under this section must be brought within a reasonable time, "in no case exceeding six months, after the judgment, dismissal,

order, or proceeding was taken." The trial court is *required* to set aside any default resulting from an attorney's mistake, inadvertence, surprise or neglect but only if the application is made within six months of entry of judgment, is in proper form, and if the trial court finds the default was in fact caused by the attorney's fault. In general, this code section is broadly construed in favor of relief in order to allow a trial on the merits and a trial court's order will not be overturned absent a clear showing of abuse of discretion. (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 980.)

Nevertheless, *Carver v. Platt* (1960) 179 Cal.App.2d 140 (*Carver*) holds, at pages 143-144, that the six-month requirement in Code of Civil Procedure section 473, subdivision (b), is jurisdictional. If the application is not made within the six-month period, the court is without jurisdiction to act. It also holds that "[a] motion renewed after denial must come within the six-month period. [Citations.]" (*Id*. at p. 144; see also *Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 340 (*Arambula*) [court has no authority to grant relief if motion not made within six-month period].) In the instant case, the first application was made within six months of the entry of default on September 29, 2008, as it was filed prior to February 24, 2009. The reporter's transcript for the February 24, 2009 hearing clearly shows that the trial court denied the application without prejudice and expected that real parties would file a new one. It is also clear that while the trial court wanted petitioners to stipulate to set aside the default and instructed the parties to meet and confer with that goal in mind, it was also aware that real parties may have to file a second application in the meantime "to protect their interests." The second application was not filed until April 1, 2009,

more than six months after the entry of default. According to *Carver* and *Arambula*, the trial court lacked jurisdiction to grant the application at that point.

The opposition does not address either of these authorities but instead cites *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 836-838 (*Johnson*), in which the court allowed a party to vacate the entry of a default judgment based upon substantial compliance with Code of Civil Procedure section 473. That case does not concern a claim that the trial court lacked jurisdiction because the motion for relief was not filed within SIX months of the entry of default. Rather, the objection in *Johnson* was based upon the moving party's failure to attach a proposed responsive pleading to his motion. Indeed, in *Johnson* the motion to set aside the default and default judgment was timely filed approximately two months after the entry of the default and the default judgment. (*Johnson*, at pp. 834-835.) Since the timely filing issue was not before the court in *Johnson*, the case does not support real parties' position that substantial compliance is sufficient, nor does it create a conflict with *Carver* and *Arambula* cited above. *Job v. Farrington* (1989) 209 Cal.App.3d 338, also cited by real parties, similarly concerns only the requirement that a responsive pleading accompany the motion for relief. (*Id*. at p. 340.)

Real parties claim that petitioners' filing of a second amended cross-complaint voided their default to the first amended cross-complaint rendering this petition moot. " 'It is settled by a long line of decisions that where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended

pleading be served on the defaulting defendant, no judgment can properly be entered on the default. [Citations.]' . . . [Citation.]" (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1743.) "A material amendment to the complaint opens a default because it permits the plaintiff to prove matters not in issue when the default was taken, which 'would materially affect the defendant's decision not to contest the action . . . .' [Citation.]" (*Id.* at p. 1744; see also *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387-390 & *Sheehy v. Roman Catholic Archbishop* (1942) 49 Cal.App.2d 537, 540 [default limited to matters alleged in original complaint so if amendment adds matter of substance, defaulted party must be given the opportunity to contest same before judgment is rendered].) Thus, if the amendment to the pleading materially alters it in a way that affects the defaulted party, the default is opened and the defaulted party is entitled to answer the amended complaint. In the instant case, the allegations as to the real parties are identical in both the first and second amended cross-complaints. Thus, there was no substantial or material amendment as to real parties and their default was not opened or voided. (See *Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 810 [an amendment that makes changes only to other defendants does not open the complaint and require the nonaffected defendants to file a new answer in order to avoid default].)

Finally, the trial court does also have equitable authority to relieve a party from an action taken more than six months prior to the application for relief when the action was taken due to extrinsic fraud or mistake. (*Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1114.) If the trial court could have acted under this authority,

petitioners would not be able to demonstrate irreparable harm and would not be entitled to a writ. Real parties claim that petitioners served notice on an incorrect address. Notice of what is never explained. Nor do they explain how a failure of proper notice constitutes extrinsic fraud or mistake that entitles them to set aside the default. In reviewing the exhibits attached to the petition and opposition, it does appear that petitioners were routinely using an incorrect zip code for service on one of real parties' co-counsel. However, the same proofs of service show a correct address for real parties' other attorney. It is therefore difficult for them to legitimately argue that they did not get proper notice. (*Adaimy v. Ruhl* (2008) 160 Cal.App.4th 583, 587-588.) In addition, if real parties intended to claim that they did not get proper notice of the entry of default, they obviously had sufficient actual notice because they filed their first (procedurally defective) motion to vacate the default in a timely manner. Consequently, the only authority real parties cite for the effect of invalid notice does not apply. (See *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 287 [notice to wrong zip code invalid only in absence of proof notice was actually received].) In addition, the trial court's exercise of its equitable power to grant relief for extrinsic fraud or mistake requires a demonstration that there was no negligence, laches, or fault on the part of the moving parties or their agents. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575.) Given that their agent/attorney has admitted fault for the failure to timely answer, it does not appear that the real parties' showing would support the trial court's exercise of its jurisdiction in equity even were we to deem that to have been the trial court's action.

DISPOSITION

Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order granting real parties in interest's motion for relief from default, and to enter an order denying that motion.

Petitioners are directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Petitioners to recover their costs.

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GAUT
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.